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In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION, PETITIONER

v.

CHARLES P. COCKE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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44 pp

QUESTION PRESENTED

Whether federal law establishes the standard for determining when the adverse domination doctrine tolls the statute of limitations on claims brought against allegedly wrongdoing officials of a failed federally insured financial institution by the FDIC as successor to the receiver for the institution.

PARTIES TO THE PROCEEDING

In addition to the respondent named in the caption, respondents include Richard E. Blair, John E. Harn, II, Lloyd B. Ramsey, Preston L. Walker, Julius F. Fogel, Terry B. Light, Light & Harrison, P.C., and John E. Harrison. As explained in note 3, *infra,* however, the question presented does not affect the lower court's disposition of the claims against respondents Fogel, Light, Light & Harrison, P.C., and Harrison (in his capacity as attorney).

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The Solicitor General, on behalf of the Federal Deposit Insurance Corporation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-17a) is reported at 7 F.3d 396. The orders of the district court (App., *infra,* 20a-22a, 23a-26a, 27a, 28a-30a, 31a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1993. A petition for rehearing was denied on December 21, 1993. App., *infra,* 18a-19a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. These cases involve activities of respondents connected with McLean Savings & Loan Association; each respondent was affiliated with or employed by that institution for all or a portion of the period from 1984 through 1988. On July 8, 1988, the Federal Savings & Loan Insurance Corporation (FSLIC) was appointed receiver of that institution. In connection with a sale of the institution from the receiver to a third party, FSLIC acquired potential claims of the institution against respondents. The Federal Deposit Insurance Corporation (FDIC) succeeded to those claims in its capacity as manager of the FSLIC Resolution Fund when FSLIC was abolished in 1989. See App., *infra*, 3a-4a & nn.2-3; 12 U.S.C. 1821a(a) (Supp. IV 1992); FDIC C.A. Br. 13-14.

2. The FDIC entered into tolling agreements with respondents, preserving a filing date of June 5, 1991, for the purpose of determining whether any complaint was timely, and then filed three separate complaints against respondents in late 1991 and 1992.[1] The complaints alleged that respondents had breached duties that they owed to the institution, which had caused the institution to suffer monetary losses.[2] In particular, the complaint alleged that, among other things, the institution improperly made

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[1] The June 5, 1991, date was significant because it was less than three years after the date that a federal receiver was appointed for the institution. Under 12 U.S.C. 1821(d)(14) (Supp. IV 1992), the statute of limitations for tort claims brought by the FDIC as receiver is three years from the later of (a) the date that the FDIC was appointed receiver or (b) the date on which the cause of action accrues.

[2] The complaints also named as defendants Thomas J. Leonard, III and Frank M. Howard. The FDIC has entered into settlement agreements with those parties. Those individuals were dismissed from the proceedings below and thus are not parties to the proceedings in this Court. See App., *infra*, 5a.

unsecured loans to an unprofitable financial service subsidiary without securing the required regulatory approvals, and that in 1986 the board of directors of the institution approved a dividend for shareholders even though the institution's financial position at that time made the dividend inappropriate. The complaint also alleged that this and other misconduct contributed to the failure of the institution. See App., *infra,* 4a-5a.

Some of the defendants in the first of the three complaints, styled *FDIC* v. *Leonard* (specifically, respondents Blair, Harrison, Harn, Light, and Light & Harrison, P.C.), filed motions for summary judgment contending that the complaint was barred by the statute of limitations. At a hearing on the motions, the district court stated its view that the FDIC's claims would be barred if the limitations period provided by state law had expired before appointment of a federal receiver. Applying Virginia law, the court concluded that the claims were governed by Virginia's one-year statute of limitations for personal actions. Because the last act or omission challenged by the FDIC occurred in April of 1987, and because a federal receiver was not appointed until July of 1988, the court concluded that the claims were barred. The court rejected the FDIC's argument that the adverse domination doctrine tolled the state limitations period, stating that "[t]his in my view is not the type of adverse domination that was present in [other cases where the doctrine was applied]." May 1, 1992, Tr. 81-83, C.A. App. 113-115. After the hearing, the district court entered an order granting the motions and dismissing those parties as defendants. App., *infra,* 27a.

The district court subsequently granted similar motions by the other respondents who were named as defendants in the *Leonard* complaint (App., *infra,* 28a-30a, 31a-33a), and then similar motions by respondents Cocke and Fogel,

who were named as defendants in the other two complaints (App., *infra,* 20a-22a, 23a-26a).

3. The court of appeals consolidated the FDIC's appeals from the three cases and affirmed with respect to the issues raised in this petition. App., *infra,* 1a-17a. The court rejected the FDIC's argument that federal law was relevant to the statute of limitations issue, stating that "the FDIC wishes to advance a state-law cause of action, and must be governed by the Virginia courts' and legislature's interpretations of that action." App., *infra,* 8a. Although the FDIC's brief (at 22-23) cited the Tenth Circuit's decision in *Farmers & Merchants National Bank* v. *Bryan,* 902 F.2d 1520, 1523 (1990), for the proposition that "federal courts * * * have recognized the need for a federal common law rule of adverse domination," the court of appeals did not cite or refer to *Bryan* in its analysis.

Interpreting Virginia law, the court agreed with the district court's conclusion that a one-year limitations period should apply. App., *infra,* 9a-11a. The court then considered the FDIC's reliance on the doctrine of adverse domination. The court concluded that Virginia had not adopted the doctrine of adverse domination, but instead applied a similar doctrine of equitable estoppel that precludes a defendant from raising a statute of limitations defense upon proof that the defendant intentionally misled the plaintiff to prevent the plaintiff from discovering the tort. The court remanded the cases to allow the district court to consider whether the FDIC could prove such intentional misconduct. App., *infra,* 11a-13a.[3]

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[3] The court of appeals also accepted the FDIC's argument that a longer statute of limitations applied to the claims against respondent Harrison in his capacity as attorney for the institution and to its claims against Light & Harrison, P.C. Accordingly, the court of appeals reversed the dismissal of those claims. App., *infra,* 14a. The claims against those parties therefore can proceed without regard to the ques-

4. The court of appeals denied the FDIC's petition for rehearing and suggestion for rehearing en banc without dissent. App., *infra*, 18a-19a.

REASONS FOR GRANTING THE PETITION

1. These cases present substantially the same question as the recent decision of the Fifth Circuit in *FDIC* v. *Dawson*, 4 F.3d 1303 (1993). Like the panel of the Fourth Circuit in these cases, the *Dawson* court held that (a) state law rather than federal law governs the question whether the adverse domination doctrine tolled the statute of limitations on a claim acquired by a federal agency as receiver against officials of a failed financial institution; and (b) state law requires the FDIC to prove something more than negligence on the part of a majority of the directors in order for the limitations period to be tolled. 4 F.3d at 1308-1309, 1311-1313.

Today we are filing a petition for a writ of certiorari seeking review of the Fifth Circuit's decision in *Dawson*.[4] As we explain in more detail in that petition, the analysis of the Fourth and Fifth Circuits does not adequately accommodate the important federal interests in determining when the FDIC can sue malfeasant officials of failed depository institutions. Furthermore, the holdings of those courts that state, rather than federal, law governs the tolling issue squarely conflict with the Tenth Circuit's decision of the same question in *Farmers & Merchants National Bank* v. *Bryan*, 902 F.2d 1520, 1522 (1990). These

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tion presented by the petition. On the other hand, the court of appeals accepted separate grounds for dismissing the claims against respondents Light (App., *infra*, 14a-15a) and Fogel (App., *infra*, 16a). The FDIC does not challenge those dispositions.

[4] We have provided counsel for respondents a copy of our petition in *Dawson*.

decisions also call into question more than $1.8 billion in claims that the FDIC and the Resolution Trust Corporation are pursuing nationwide. Accordingly, the question warrants review by this Court. Nevertheless, because the Court's disposition of *O'Melveny & Myers* v. *FDIC*, cert. granted, 114 S. Ct. 543 (1993) (No. 93-489) (set for argument March 21, 1994), may shed light on the proper analysis to be used in deciding *Dawson* and these cases, we suggest in our petition in *Dawson* that the Court may wish to hold *Dawson* pending its disposition of *O'Melveny*. The same course would be appropriate here.

2. We also suggest in the petition in *Dawson* that plenary review of the question presented here and in *Dawson* would be appropriate if the Court's disposition of *O'Melveny* does not lead it to remand the cases for further consideration by the lower courts. For two reasons, we believe that *Dawson* would constitute a better vehicle than these cases for such plenary review. First, the decision in these cases is not final; the court of appeals has remanded the matter to the district court. That disposition leaves open the possibility that the FDIC ultimately will be able to recover even under the more onerous standard adopted by the Fourth Circuit. The Fifth Circuit's decision in *Dawson*, on the other hand, affirms a final judgment of dismissal, thus more squarely presenting the question on which we seek review.

Second, the opinion of the court of appeals in *Dawson* expressly considers and rejects the analysis and decision of the Tenth Circuit in *Bryan*. See 4 F.3d at 1308-1309. The court of appeals in these cases, by contrast, neither acknowledges nor discusses *Bryan* in its opinion (although, as we noted above, the FDIC had relied on *Bryan* in its brief). Accordingly, the existing conflict with the Tenth Circuit is more squarely posed by the decision of the Fifth Circuit in *Dawson*. We believe, therefore, that *Dawson* should be the primary vehicle for review of the

issue presented by these cases and that our petition in these cases should be disposed of as appropriate in light of the Court's disposition of the petition in *Dawson*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *O'Melveny & Myers* v. *FDIC*, cert. granted, 114 S. Ct. 543 (1993) (No. 93-489) (set for argument March 21, 1994), as well as the Court's disposition of the petition we are filing today in *FDIC* v. *Dawson*. The cases then should be disposed of as appropriate in light of the Court's disposition of those two cases.

Respectfully submitted.

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MARCH 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 92-1987

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF THE
UNITED STATES, PLAINTIFF-APPELLANT

v.

CHARLES P. COCKE, DEFENDANT-APPELLEE

No. 92-1994

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF THE
UNITED STATES, PLAINTIFF-APPELLANT

v.

JULIUS F. FOGEL, DEFENDANT-APPELLEE

No. 92-1996

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF THE
UNITED STATES, RECEIVER OF MCLEAN SAVINGS AND LOAN
ASSOCIATION, PLAINTIFF-APPELLANT

v.

LLOYD B. RAMSEY; PRESTON L. WALKER; RICHARD E. BLAIR; JOHN E. HARN, II; TERRY B. LIGHT; JOHN E. HARRISON; LIGHT & HARRISON, PC, DEFENDANTS-APPELLEES

AND

THOMAS J. LEONARD, III; FRANK M. HOWARD; JULIUS F. FOGEL, DEFENDANTS

Argued May 6, 1993
Decided Oct. 15, 1993
Amended By Order Filed Nov. 16, 1993

Before: ERVIN, Chief Judge, MURNAGHAN, Circuit Judge, and BUTZNER, Senior Circuit Judge.

OPINION

ERVIN, Chief Judge:

The Federal Deposit Insurance Corporation ("FDIC"), acting as receiver of McLean Savings & Loan Association ("McLean"), elected to proceed with a breach of duty action against various parties affiliated with the savings and loan. The district court summarily disposed of all the FDIC's claims as untimely filed under the applicable Virginia[1] statute of limitations. This appeal presents the issue whether federal or Virginia law may operate to toll the running of the statute of limitations on any of the FDIC's claims. Concluding that Virginia's equitable estoppel doctrine could toil the running of the statute of limita-

[1] Because McLean was incorporated and operated under the laws of Virginia, the state's laws also govern the nature and viability of any tort actions against McLean directors or affiliates.

tions making some or all of the FDIC's claims timely, we reverse the district court's dismissal of the claims on the basis of the running of the statute of limitations. To the extent that individual defendants contend that action against them is inappropriate on grounds other than the statute of limitations, we will discuss their situations in turn.

I

The issues raised by this appeal revolve largely around interpretation and application of law; therefore, only a limited familiarity with the facts is necessary. McLean was a state-chartered, federally-insured stock savings association located in McLean, Virginia. By participating in the federal insurance program, McLean subjected itself to federal examinations and, in troubled times, oversight. For several years, McLean operated without incident, making traditional home mortgages. As interest rates became more competitive, McLean sought additional ways to generate revenues, however. In 1981 McLean formed McLean Financial Corporation ("MFC"), a financial service subsidiary to McLean, to originate, broker, buy, sell, and service residential real estate loans. Many of McLean's directors also sat on the board of MFC.[2]

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[2] Lloyd B. Ramsey was a director of McLean from 1977 to 1988 and Chairman of the Board of Directors from 1977 to 1986. Preston L. Walker was a director of McLean from 1977 to 1988, as well as a director of MFC from 1981 to 1987. Richard E. Blair served as a McLean director from 1977 to 1988 and as a MFC director from 1985 to 1987. John E. Harn, II was a director of McLean from 1980 to 1988 and a director of MFC from 1981 to 1987. Julius F. Fogel was a director of McLean from 1977 to 1987. Charles P. Cocke was a McLean director from 1977 to 1988 and a director of MFC from 1982 to 1987. John E. Harrison served as a director of McLean from 1977 to 1988 and Chairman of MFC's Board of Directors from 1982 to 1987. Har-

MFC, though initially very profitable, began to suffer losses in 1985, prompting McLean to attempt to bolster the subsidiary's slumping financial performance. McLean began making unsecured loans to MFC, allegedly without seeking the required regulatory approval. In 1986 the McLean board also approved the payment of dividends to McLean shareholders despite the institution's financial inability to make such payments. This misconduct together with other asserted fraudulent and unscrupulous transactions propelled McLean into receivership on July 8, 1988.[3] As receiver the FDIC retained any potential claims the corporation could have maintained against its former directors, officers, or attorneys for their breaches of duty owed to the corporation. Therefore, on November 29, 1991, the FDIC brought the first of three lawsuits alleging breaches of duty based on the conduct involving the management of McLean and MFC.[4] The first action was filed against Thomas J. Leonard, III, Frank M. Howard,[5] [illegible]d B.

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rison also was one of two principles [*sic*] in the law firm of Light & Harrison, P.C., which served as general counsel to both McLean and MFC from 1981 to 1987.

[3] On July 8, 1988, the Federal Savings & Loan Insurance Corporation ("FSLIC") was appointed as receiver. The FSLIC then took possession of all the assets and obligations of both McLean and its subsidiary MFC, including potential claims against former directors, officers, and attorneys. The FDIC became the successor-in-interest to these claims upon the dissolution of the FSLIC pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. § 1821a(a).

[4] The last act of misconduct allegedly occurred in April 1987. The FDIC asserts generally that when the actions giving rise to its complaints occurred, McLean was dominated and controlled by its directors and officers, some of whom also controlled MFC.

[5] Howard and Frank were dismissed from this appeal on October 8, 1992 and are not party to the current proceedings. *FDIC v. Ramsey*, No. 92-1996, order at 2 (4th Cir. Oct. 8, 1992).

Ramsey, Preston L. Walker, and Richard E. Blair—former directors of McLean and MFC—for breach of their fiduciary duty of care to the corporations for which they served. Amending this complaint, the FDIC added similar charges against John E. Harn, II, McLean's president; John E. Harrison, McLean director and attorney; Terry B. Light, McLean attorney; and Light & Harrison, P.C., general counsel to McLean. After failed attempts to add additional directors through amendment, the FDIC filed separate complaints against Charles P. Cocke and Julius F. Fogel. The FDIC entered into tolling agreements with the directors and attorneys named in the three actions to establish the filing of its complaints on June 5, 1991, for purposes of invoking the statute of limitations.

In the district court, the FDIC claims were maintained as *FDIC v. Leonard* (CA-91-1773-A); *FDIC v. Cocke* (CA-92-350-A); and *FDIC v. Fogel* (CA-92-496-A). Defendants in *FDIC v. Leonard* brought a motion to dismiss or alternatively for summary judgment. The district court granted summary judgment for the defendants on the basis that the applicable Virginia statute of limitations had run before the FDIC acquired rights in the cause of action. *See FDIC v. Leonard,* No. CA-91-1773-A, orders (E.D.Va. Jul. 20, 1992 & May 2, 1992) (dismissing claims against Thomas J. Leonard, III and Frank M. Howard); order (E.D.Va. May 20, 1992) (dismissing claims against Lloyd B. Ramsey and Preston L. Walker); order (E.D.Va. May 1, 1992) (dismissing claims against Richard E. Blair, John E. Harn, II, Terry B. Light, John E. Harrison, and Light & Harrison, P.C.). The district court, recognizing the factual similarity of *FDIC v. Cocke* and *FDIC v. Fogel,* dismissed them on the basis articulated in *FDIC v. Leonard. See FDIC v. Cocke,* No. CA-92-350-A, order (E.D.Va. Aug. 12, 1992); *FDIC v. Fogel,* No. CA-92-496-A, order (E.D.Va. June 17, 1992). The

FDIC appealed the summary disposition of all three cases. We consolidated the cases and deal with them as one in this opinion.

II

A

Federal banking regulation, in an effort to mitigate the costs to the taxpayer of bank and savings and loan failures, permits the FDIC to pursue any claims a corporation might have against its officers or directors once the FDIC becomes receiver of that corporation. *See* 12 U.S.C. § 1821(d); *Texas Am. Bancshares, Inc. v. Clarke,* 954 F.2d 329, 339 (5th Cir. 1992). These breach of duty causes of action are hybrid in nature—authorized and enabled by state law, but appropriated by the FDIC as a means of redress for violations of various federal banking acts. Therefore, the analysis required to determine the viability of such an action is somewhat tedious, incorporating components of both state and federal law. The most problematic aspect of these actions is the determination of whether a statute of limitations bars the claim. This determination proves taxing because the applicable state statute of limitations controls whether the action is viable when the right to bring the action inures to the FDIC, while the applicable federal statute of limitations controls whether the action was timely filed.

To determine whether a statute of limitations bars the FDIC's actions in this case, we must first answer the following question: Did the Virginia statute of limitations run between the time the action accrued and the date of receivership? To answer this question, we must determine the applicable Virginia statute of limitations and the effect, if any, of any provisions of Virginia law to toll the running of the statutory period.

The FDIC attempts to add a gloss to our analysis by suggesting that federal law must guide and inform the application of the state statute of limitations. The FDIC cites *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979), for this proposition, urging us, in applying the state statute of limitations, to incorporate a uniform federal tolling rule patterned after the doctrine of adverse domination. In *Kimbell Foods* the Supreme Court discussed when federal common law must govern federal actions complicated by state substantive components. The Court noted that

> [t]o resolve this question, we must first decide whether federal or state law governs the controversies; and second, if federal law applies, whether this Court should fashion a uniform . . . rule or incorporate state . . . law.

Id. at 718, 99 S.Ct. at 1453.

In *Kimbell Foods* the Court was called upon to determine "whether contractual liens arising from certain federal loan programs take precedence over private liens, in the absence of a federal statute setting priorities." *Id.* at 718, 99 S.Ct. at 1453. The Court held:

> That the statutes authorizing these federal lending programs do not specify the appropriate rule of decision in no way limits the reach of federal law. It is precisely when Congress has not spoken "in an area comprising issues substantially related to an established program of government operation," that *Clearfield* directs federal courts to fill the interstices of federal legislation "according to their own standards."

Id., at 727, 99 S.Ct. at 1457 (quoting *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593, 93 S.Ct. 2389, 2397, 37 L.Ed.2d 187 (1973) and *Clearfield Trust*

Co. v. United States, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1943)) (citations omitted). The Court went on to adopt the states' systems of priority as the governing federal common law. *Id.* at 729, 99 S.Ct. at 1459.

In this case an extensive program of federal regulation does not enable the FDIC's breach of duty cause of action. Although federal law allows the FDIC, as receiver, to bring McLean's claims, the claims are uniquely state-law causes of action acquired through a wholesale takeover of McLean's assets. If it were not for Virginia common law's prohibition against breaches of fiduciary duty by corporate directors, the FDIC would have no claims to bring. Therefore, this case does not present the situation in which federal statute authorizes and outlines federal activity, but neglects to furnish a crucial provision that would effectuate the federal activity more appropriately.

Under the *Kimbell Foods* analysis, the FDIC has failed to demonstrate the presence of a federal program suffering from the absence of a controlling piece of federal law. Instead, the FDIC wishes to advance a state-law cause of action, and must be governed by the Virginia courts' and legislature's interpretations of that action. *See White v. FDIC,* 122 F.2d 770, 774-75 (4th Cir. 1941) (looking to Virginia law to determine whether Virginia's statute of limitations is tolled during period of director wrongdoing), *cert. denied,* 316 U.S. 672, 62 S.Ct. 1043, 86 L.Ed. 1747 (1942).

B

The FDIC argues on appeal that the district court incorrectly applied Virginia's statute of limitations in two material ways. First, the FDIC contends that the district court chose the incorrect Virginia statutory bar to apply to its breach of duty claims. In addition, the FDIC suggests

that the district court erred by not applying, as a matter of federal common law, the doctrine of adverse domination to toll the Virginia statute of limitations for the period of time during which the directors who are defendants in this action controlled McLean's and MFC's boards. Because we reject the FDIC's argument that tolling, in this case, should be governed by federal law, we limit our analysis to the applicable statute of limitations and its ability to be tolled under Virginia law.

Therefore, the first step toward our decision whether a statute of limitations bars the FDIC's action is the determination of what statute of limitations Virginia applies to breach of duty actions. The FDIC disagrees with the decision the district court made to apply Virginia's one-year statute of limitations to its causes of action. Virginia's one-year statute of limitations applies to "[e]very personal action, for which no limitation is otherwise prescribed." Va.Code Ann. § 8.01-248 (Michie 1992). The FDIC argues in favor of Virginia's longer contracts or injury to property statute of limitations. For actions based in contract, the statute of limitations is three years for oral contracts and five years for written contracts. *Id.* § 8.01-246. "Every action for injury to property . . . shall be brought within five years after the cause of action accrues." *Id.* § 8.01-243(B).

The Virginia courts have not addressed directly which statute of limitations applies to a breach of fiduciary duty cause of action. Its courts, however, have refused to apply a contracts statute of limitations to a breach of duty action. *See Winston v. Gordon,* 115 Va. 899, 80 S.E. 756, 762 (1914). Eliminating the contracts statute of limitations provided by section 8.01-246, we still are faced with the decision whether the general one-year or the five-year tort statute of limitations is more appropriate.

The FDIC suggests that the five-year statute of limitations for actions alleging injury to property governs this

case because its injury derives from the decline in the value of McLean resulting from the directors' and officers' breach of their duty. The Supreme Court of Virginia has not addressed this issue; however, by looking at the contexts in which the Supreme Court of Virginia has applied section 8.01-243(B), we logically can conclude that the Virginia court would not apply section 8.01-243(B) as the FDIC suggests.

The Virginia court has applied section 8.01-243(B) consistently to those cases that involve one party's actions directly against another party's property. *See, e.g., Bader v. Central Fidelity Bank,* 245 Va. 286, 427 S.E.2d 184, 187 (1993) (holding that section 8.01-243(B) applies to action for conversion of an instrument); *Vines v. Branch,* 244 Va. 185, 418 S.E.2d 890, 894 (1992) (holding that section 8.01-243(B) applies to action for damages resulting from continuous trespass to personal property); *Eagles Court Condominium Unit Owners Ass'n v. Heatilator, Inc.,* 239 Va. 325, 329, 389 S.E.2d 304, 306 (1990) (holding that section 8.01-243(B) could apply to claim for damages resulting from an allegedly defective product); *Hampton Rds. Sanitation Dist. v. McDonnell,* 234 Va. 235, 239, 360 S.E.2d 841, 843 (1987) (holding that section 8.01-243(B) applies to action to recover for damage to property caused by sewer discharge); *Lavery v. Automation Management Consultants, Inc.,* 234 Va. 145, 154, 360 S.E.2d 336, 342 (1987) (holding that section 8.01-243(B) applies to action seeking damages for unauthorized use of trade name). In summary, when a defendant's alleged conduct was directed at the plaintiff's property, and not at the plaintiff personally, the conduct constitutes an injury to property governed by section 8.01-243(B). *See Vines,* 244 Va. at 191, 418 S.E.2d at 894; *Pigott v. Moran,* 231 Va. 76, 80, 341 S.E.2d 179, 182 (1986).

In the instant case, the action involves the FDIC's allegations against McLean's directors that they breached a duty owed to McLean to act in its best interests. The FDIC's cause of action arises not merely because of a decline in McLean's property value; many prudent and well-reasoned actions by a corporation's board may cause immediate declines in share value or lead to the disposal of valuable assets. The FDIC maintains the breach of duty action because McLean's board has acted in a manner that purportedly personally wronged McLean; indeed, the availability of a breach of duty action derives from the personification of a corporation. Therefore, the one-year personal, not the five-year property, statute of limitations is most appropriate for a breach of duty cause of action, as the district court correctly decided.

Under section 8.01-248's one-year statute of limitations, the FDIC must have acquired its interest in the action within one year from the date the action accrued. If Virginia's statute of limitations runs before the FDIC gained its right to the action through receivership, then the FDIC gained a stale claim and may not pursue it. Although the district court held that the FDIC's claims became stale in just such fashion, the FDIC counters on appeal that the one-year statute of limitations should have been tolled under the doctrine of adverse domination.

Under the doctrine of adverse domination, a statute of limitations is tolled on an action against director/officer misconduct so long as a majority of the board is controlled by the alleged wrongdoers. The doctrine rests on the theory that if the wrongdoers "controlled the corporation through a majority of stock ownership and control of the directorate[,] there [would] consequently [be] no one to sue them." *White v. FDIC,* 122 F.2d 770, 775 (4th Cir. 1941), *cert. denied,* 316 U.S. 672, 62 S.Ct. 1043, 86 L.Ed. 1747 (1942).

Virginia courts have not adopted the doctrine of adverse domination expressly. We, however, may be guided by another approach that Virginia takes to the tolling of a statute of limitations. A Virginia code provision details that

> When the filing of an action is obstructed by a defendant's . . . using any other direct or indirect means to obstruct the filing of an action, then the time that such obstruction has continued shall not be counted as any part of the period within which the action must be brought.

VA.Code Ann. § 8.01-229(D) (Michie Supp. 1993). The Supreme Court of Virginia has supplemented this statutory provision by suggesting that the doctrine of equitable estoppel may preclude a defendant from raising expiration of the period of limitations as a defense. *See, e.g., Wilson v. Butt,* 168 Va. 259, 190 S.E. 260, 265 (1937); *Sadler v. Marsden,* 160 Va. 392, 168 S.E. 357, 360-61 (1933); *City of Bedford v. James Leffel & Co.,* 558 F.2d 216, 217-18 (4th Cir. 1977) (construing Virginia law).

Although equitable estoppel in Virginia generally does not require an intentional misrepresentation, *e.g., T . . . v. T . . . ,* 216 Va. 867, 872-73, 224 S.E.2d 148, 152 (1976) (applying equitable estoppel to prevent the imposition of the statute of frauds), the Virginia Supreme Court has required intentional conduct to allow the doctrine to toll the running of a statute of limitations. The court held that

> [c]onstructive fraud is not such as will toll the running of the statute of limitations. The character of fraud necessary to toll the statute must be of a variety involving moral turpitude. A defendant must intend to conceal the discovery of the cause of action by trick or artifice and must have thus actually concealed it from the plaintiff in order for the exception to apply.

Richmond Redev. & Hous. Auth. v. Laburnum Constr. Corp., 195 Va. 827, 840, 80 S.E.2d 574, 582 (1954); *see also Hawks v. DeHart*, 206 Va. 810, 814, 146 S.E.2d 187, 190 (1966).

Based on these provisions of Virginia statutory and case law, we hold that a statute of limitations is tolled until a person intentionally misled by a putative defendant could reasonably discover the wrongdoing and bring action to redress it. Therefore, we conclude that the district court erred by rejecting outright the application of a tolling mechanism to the facts of this case. Under Virginia's doctrine of equitable estoppel, however, the FDIC will have to do more than show that all of McLean directors were implicated in the wrongdoing, and that it was unable to sue until it became the corporation's receiver. The FDIC also will have to show that the directors concealed their wrongdoing from McLean, MFC, and their shareholders, the parties from whom the FDIC derived its interest in this lawsuit, during the period after the last act of alleged misconduct until the FDIC became receiver. It will be for the district court, on remand, to determine the extent to which equitable estoppel tolls Virginia's one-year statute of limitations.[6]

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[6] In addition to the issues concerning the Virginia statute of limitations discussed herein, the FDIC argued on appeal the timeliness of its action under the federal statute of limitations. Because the district court limited its rulings to the Virginia statute of limitations, any discussion we would offer on the federal statute of limitations would be advisory in nature. On remand, the district court will have an opportunity to apply the federal statute of limitations; therefore, we refrain from addressing the issue now, assured that, if need be, the district court's reasoned application of the law will provide us a more appropriate means of review.

III

The FDIC has included McLean's attorneys in its cause of action. On appeal, it asserts two erors in the district court's dismissal of the attorney defendants. First, the FDIC alleges that the district court applied the incorrect statute of limitations to its claims based on attorney malpractice. The district court applied the Virginia one-year statute of limitations to these claims. The Supreme Court of Virginia, however, has held that "actions for legal malpractice are governed by the limitations periods applicable to actions for breach of contract." *See MacLellan v. Throckmorton,* 235 Va. 341, 343, 367 S.E.2d 720, 721 (1988); *Oleyar v. Kerr,* 217 Va. 88, 90, 225 S.E.2d 398, 400 (1976). In this case either the three- or five-year contract statute of limitations will apply based on a finding as to whether the alleged malpractice was governed by a written or oral contract. To the extent that Harrison's alleged wrongdoing stems from his actions as a director, the one-year statute will apply; to the extent the allegations stem from his service as McLean's attorney, the longer statutory period will apply. The longer period also will apply to Light & Harrison, P.C.

Second, the FDIC alleges that the district court erred in suggesting that the FDIC's claims against Terry B. Light are derivative and therefore barred by the Virginia Code's Professional Corporations chapter. The FDIC's claim is without merit. Section 13.1-547[7] of the Professional Cor-

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[7] Section 13.1-547 states:

> The provisions of this chapter shall not be construed to alter or affect the professional relationship between a person furnishing professional services and a person receiving such service either with respect to liability arising out of such professional service or the confidential relationship between the person rendering the professional service and the person receiving such professional

orations chapter clearly maintains the traditional grounds for liability between a member of a professional corporation and her clients, while exculpating a member for the negligent activities of other members of the corporation. Va.Code Ann. § 13.1-547 (Michie 1989). Case law reinforces this concept; construing section 13.1-547, we have noted "that professionals practicing in a professional corporation enjoy limited personal liability for wrongful acts committed by their fellow professionals in the corporation." *Bettius & Sanderson, P.C. v. National Union Fire Ins. Co.*, 839 F.2d 1009, 1013 (4th Cir. 1988). Light will be liable to the FDIC only to the extent that he is responsible for Light & Harrison, P.C.'s share of the liability, if any. Light cannot be held personally liable if he was not personally responsible for any of the work done for McLean. Therefore, the district court's dismissal of Light on this alternate basis was correct.

IV

Two defendants, John E. Harrison and Light & Harrison, P.C., made a motion to us to dismiss the FDIC's appeal as to them on the ground that they have been released

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service, if any, and all such confidential relationships enjoyed under the laws of this Commonwealth, whether now in existence, or hereafter enacted, shall remain inviolate. A director, officer, agent or employee of a professional corporation shall not, by reason of being any director, officer, agent or employee of such corporation, be personally liable for any debts or claims against, or the acts or omissions of the corporation or of another director, officer, agent or employee of the corporation, but the corporation shall be liable for the acts or omissions of its director, officer, agents, employees and servants to the same extent to which any other corporation would be liable for the acts or omissions of its directors, officers, agents, employees and servants while they are engaged in carrying on the corporate business.

Va. Code Ann. § 13.1-547 (Michie 1993).

from the cause of action. The FDIC released two other defendants, Thomas J. Leonard, III and Frank M. Howard, pursuant to settlement agreements that also released Leonard's and Howard's "heirs, assigns, successors, and any former or current agents, employees, servants, affiliates, attorneys and other representatives," from all claims which the FDIC "may now have, or may ever have had against [Leonard or Howard] for damages . . . alleged to have been suffered or to be suffered by [McLean] or MFC . . ." The release operates to relieve Harrison and Light & Harrison, P.C. of liability only as to advice and services rendered under the direct employ of Leonard or Howard. To the extent that the FDIC alleges liability against Harrison and Light & Harrison, P.C. based on their own relationships with McLean and not through the relationships of Leonard and Howard, Harrison and Light & Harrison, P.C. are not released. Therefore, we conclude dismissal would not be proper and so order.

V

Julius F. Fogel raises the following issue unique to him. He asserts that the FDIC failed to comply with its tolling agreement with him by not bringing action against him on or before February 24, 1992. After reviewing the tolling agreement in question, the entries in the district court's docket, and the parties' briefs and arguments on this point, we conclude that Fogel should be dismissed on the basis of the FDIC's failure to comply with the tolling agreement.

VI

In summary, we affirm the district court's decision to apply Virginia's one-year statute of limitations to the actions against Charles P. Cocke, Lloyd B. Ramsey, Preston

L. Walker, Richard E. Blair, John E. Harn, II, and John E. Harrison, in his capacity as a director, but reverse the district court's determination outright that no tolling principle affects the running of that statutory period. We reverse the district court's application of a one-year statute of limitations to the actions against John E. Harrison in his capacity as McLean's attorney and against Light & Harrison, P.C., and we deny the motion to dismiss of Harrison and Light & Harrison, P.C. We affirm the dismissal of all proceedings against Julius F. Fogel and Terry B. Light. In so doing, we remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1987(L)
(CA-92-350-A)

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF THE
UNITED STATES, PLAINTIFF-APPELLANT

versus

CHARLES P. COCKE, DEFENDANT-APPELLEE

FILED: December 21, 1993

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

Appellees John E. Harrison and Light & Harrison, P.C. filed a petition for rehearing with suggestion for rehearing in banc. Appellant filed a petition for rehearing with suggestion for rehearing in banc and appellees filed answers to appellant's petition. No member of the Court requested a poll on the suggestions for rehearing in banc, and the original judicial panel voted to deny rehearing in banc.

The Court denies both petitions for rehearing with suggestions for rehearing in banc.

Entered at the direction of Chief Judge Ervin with the concurrence of Judge Murnaghan and Senior Judge Butzner.

For the Court

/s/ Bert M. Montague

Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 92-350-A

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENT OF THE
UNITED STATES, PLAINTIFF

v.

CHARLES P. COCKE, DEFENDANT

[FILED Aug. 12, 1992]

FINAL ORDER

THIS CAUSE came before the Court on the Motion to Dismiss of Defendant, Charles P. Cocke and the acknowledgments of Plaintiff, Federal Deposit Insurance Corporation, set forth herein; and

IT APPEARING TO THE COURT that Plaintiff and Defendant acknowledge that the factual allegations and legal theories presented by Plaintiff against Defendant in the Complaint filed in this action are substantially the same as the factual allegations and legal theories presented by Plaintiff against various other named Defendants in the companion action before this Court known as *Federal Deposit Insurance Corporation v. Leonard, Thomas J., III, et al.*: Civil Action No. 91-1773-A ("Leonard Case");

IT FURTHER APPEARING TO THE COURT that on May 1, 1992, this Court granted Motions for Summary Judgment filed by Defendants, Blair, Harn, Light, Harrison, and Light & Harrison, P.C. in the Leonard Case;

IT FURTHER APPEARING TO THE COURT that Plaintiff and Defendant acknowledge that the rulings made by the Court on the Motions for Summary Judgment in the Leonard Case govern the Court's consideration of the Motion to Dismiss of Defendant in this action;

IT FURTHER APPEARING TO THE COURT that Defendant was an officer and director of McLean Savings and Loan Association during the period of time from 1977 through January, 1988, and a director of McLean Financial Corporation during the period of time from 1982 through September, 1987;

IT FURTHER APPEARING TO THE COURT that claims alleged against Defendant in the Complaint filed by Plaintiff arose no later than April, 1987;

IT FURTHER APPEARING TO THE COURT that the claims alleged against Defendant in the Complaint filed by Plaintiff were governed by the one (1) year statute of limitations set forth in § 8.01-248 of the Code of Virginia, 1950, as amended;

IT FURTHER APPEARING TO THE COURT that by virtue of the foregoing, the statute of limitations for the claims alleged in the Complaint filed by Plaintiff herein expired no later than April, 1988;

IT FURTHER APPEARING TO THE COURT that on July 8, 1988, the Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation as receiver of McLean Savings and Loan Association;

IT FURTHER APPEARING TO THE COURT that by virtue of the tolling agreements executed by Plaintiff and Defendant, the Complaint in this action was deemed filed on June 5, 1991; and

IT FURTHER APPEARING TO THE COURT that by virtue of the foregoing, the claims alleged in the Complaint are barred by the statute of limitations set forth in § 8.01-248 of the Code of Virginia, 1950, as amended.

NOW THEREFORE, for the reasons set forth herein, it is hereby ADJUDGED, ORDERED and DECREED that the Motion to Dismiss of Defendant, Charles P. Cocke, should be and hereby is granted and that the Complaint filed by Plaintiff, Federal Deposit Insurance Corporation, should be and hereby is dismissed with prejudice. Plaintiff expressly notes its objections to all of these rulings in the Leonard Case and in this action and this order is without prejudice to Plaintiff's rights to appeal all such rulings.

ENTERED this 12th day of August, 1992.

/s/ Claude M. Hilton
United States District Judge

WE ASK FOR THIS:

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By: /s/ William T. Freyvogel
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Virginia State Bar No. 15072,
Counsel for Defendant

SEEN AND OBJECTED TO:

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LESLIE W. LICKSTEIN, Esq. (VA Bar # 17898)
Counsel for Plaintiff

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 92-496-A

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF THE
UNITED STATES, PLAINTIFF

v.

JULIUS FOGEL, DEFENDANT

[FILED Jun. 17, 1992]

CONSENT ORDER

THIS CAUSE came before the Court on a Consent Motion to Dismiss of plaintiff Federal Deposit Insurance Corporation ("FDIC") and defendant Julius Fogel, M.D., and the acknowledgements set forth herein.

IT APPEARING TO THE COURT that the plaintiff and the defendant acknowledge that the factual allegations and legal theories presented by the plaintiff's Complaint in this action are substantively identical to the factual allegations and legal theories presented by the plaintiff against various other defendants named in the separate action *FDIC v. Leonard, et al.*: Civ. 91-1773-A (the "*Leonard* action"), currently pending in this Court;

IT FURTHER APPEARING TO THE COURT that on May 1, 1992, this Court granted Motions for Summary Judgment filed by defendants, Blair, Harn, Light, Harrison, and Light & Harrison, P.C. in the *Leonard* action;

IT FURTHER APPEARING TO THE COURT that plaintiff and defendant acknowledge that the rulings made by the Court on the Motions for Summary Judgment in the *Leonard* action govern the Court's consideration of the Motion to Dismiss of defendant Dr. Fogel in this action;

IT FURTHER APPEARING TO THE COURT that the claims alleged against the defendant in the plaintiff's Complaint arose no later than April 1987;

IT FURTHER APPEARING TO THE COURT that the defendant was retired from the board of directors of McLean Savings & Loan Association in May 1987;

IT FURTHER APPEARING TO THE COURT that the claims alleged against the defendant in the plaintiff's Complaint were governed by the one-year statute of limitations set forth in § 8.01-248 of the Code of Virginia, 1950, as amended;

IT FURTHER APPEARING TO THE COURT that by virtue of the foregoing, the statute of limitations for the claims alleged in the plaintiff's Complaint herein expired no later than April 1988;

IT FURTHER APPEARING TO THE COURT that on July 8, 1988, the Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation as receiver of McLean Savings and Loan Association;

IT FURTHER APPEARING TO THE COURT that the Complaint in this action was filed after April 1988;

IT FURTHER APPEARING TO THE COURT that by virtue of the foregoing, the claims alleged in the Complaint are barred by the statute of limitations set forth in § 8.01-248 of the Code of Virginia, 1950, as amended;

IT FURTHER APPEARING TO THE COURT that the plaintiff takes exception and objects to the Court's ruling in the *Leonard* action but acknowledges that it would apply equally to claims against defendant Julius Fogel in this action.

NOW, THEREFORE, for the reasons set forth herein and upon the record as a whole in this action and in the *Leonard* action, it is hereby ADJUDGED, ORDERED and DECREED that the Motion to Dismiss of defendant Julius Fogel, M.D., should be and hereby is granted and that the Complaint filed by plaintiff the FDIC should be and hereby is dismissed with prejudice; and it is further

ORDERED that nothing herein should be construed to constitute a waiver, or evidence of a waiver, by either party of any argument or ground for disposition of this action outside the issues specifically ruled upon herein.

ENTERED this 17 day of June, 1992.

/s/ Albert V. Bryan, Jr.
ALBERT V. BRYAN, JR.
United States District Judge

WE ASK FOR THIS:

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Counsel for Plaintiff

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 91-1773-A

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF THE
UNITED STATES, PLAINTIFF

v.

THOMAS J. LEONARD, III, ET AL., DEFENDANTS

[FILED May 1, 1992]

ORDER

For the reasons stated from the bench, it is hereby ORDERED that the motion of the defendants Richard Blair, John Harrison, John Harn, Terry Light, and Light & Harrison, P.C., for summary judgment is granted, and they are dismissed as defendants in this action.

/s/ Albert V. Bryan, Jr.
ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
May 1st, 1992

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 91-1773A

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF THE
UNITED STATES, PLAINTIFF

v.

THOMAS J. LEONARD, III, FRANK M. HOWARD, JOHN E. HARN, II, LLOYD B. RAMSEY, PRESTON L. WALKER, RICHARD E. BLAIR, JOHN E. HARRISON, TERRY B. LIGHT, AND LIGHT & HARRISON, P.C., DEFENDANTS

ORDER OF DISMISSAL

THIS MATTER came on the motion of defendants Thomas J. Leonard and Frank M. Howard to dismiss Counts I, II, III and IV of the Amended Complaint; and

WHEREAS, upon consideration of the parties' briefs and oral argument on May 1, 1992, this Court entered an Order granting the motions to dismiss or in the alternative for summary judgment of defendants John E. Harrison, Terry B. Light, Light & Harrison, P.C., John E. Harn, II and Richard E. Blair based upon the applicable statutes of limitations; and

WHEREAS, the ruling of the Court made from the bench on May 1, 1992, and embodied in this Court's Order

of May 1, 1992, would apply equally to defendants Howard and Leonard as to Counts I, II, III and IV of the Amended Complaint; and

WHEREAS, the plaintiff, as evidenced by its counsel's endorsement hereto, takes exception and objects to the Court's ruling but acknowledges that it would apply equally to defendants Howard and Leonard as to Counts I, II, III and IV of the Amended Complaint; and

WHEREAS, this Court's ruling would have no effect upon Count V (Money Due and Owing) against Howard and Leonard, now therefore, it is hereby

ORDERED that Summary Judgment is granted as to Counts I, II, III and IV of the Amended Complaint and dismissed as to defendants Thomas J. Leonard and Frank M. Howard is granted for the reasons set forth in the Court's May 1, 1992, ruling from the bench and the Court's Order of May 1, 1992.

ENTERED this 8th day of May, 1992.

/s/ Albert V. Bryan, Jr.
Judge ALBERT V. BRYAN, JR.
Judge, United States District Court

WE ASK FOR THIS:

COHEN, GETTINGS, & DUNHAM

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WUERKER & TRIARHOS, P.C.

/s/ Jack L. Wuerker

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Counsel for Defendant Thomas J. Leonard, III

SEEN:

BAYH, CONNAUGHTON, FENSTERHEIM & MALONE, P.C.

By: /s/ Leslie W. Lickstein

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LESLIE W. LICKSTEIN, Esq.
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Federal Deposit Insurance Corporation

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 91-1773A

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF THE
UNITED STATES, PLAINTIFF

v.

THOMAS J. LEONARD, III, ET AL., DEFENDANTS

[FILED May 20, 1992]

ORDER OF DISMISSAL

THIS MATTER came on the motion of defendants Lloyd B. Ramsey and Preston L. Walker to dismiss Counts I, II, III and IV of the Amended Complaint; and

WHEREAS, upon consideration of the parties' briefs and oral argument on May 1, 1992, this Court entered an Order granting the motions to dismiss or in the alternative for summary judgment of defendants John E. Harrison, Terry B. Light, Light & Harrison, P.C., John E. Harn, II and Richard E. Blair based upon the applicable statutes of limitations; and

WHEREAS, the ruling of the Court made from the bench on May 1, 1992, and embodied in this Court's Order

of May 1, 1992, would apply equally to defendants Ramsey and Walker as to Counts I, II, III and IV of the Amended Complaint; and

WHEREAS, the plaintiff, as evidenced by its counsel's endorsement hereto, takes exception and objects to the Court's ruling but acknowledges that it would apply equally to defendants Ramsey and Walker as to Counts I, II, III and IV of the Amended Complaint; it is hereby

ORDERED that Counts I, II, III and IV of the Amended Complaint are dismissed as to defendants Lloyd B. Ramsey and Preston L. Walker for the reasons set forth in the Court's May 1, 1992, ruling from the bench and the Court's Order of May 1, 1992.

ENTERED this 20th day of May, 1992.

/s/ Albert V. Bryan, Jr.
Judge ALBERT V. BRYAN, JR.
Judge, United States District Court

WE ASK FOR THIS:

KILCARR & VOLZER

/s/ Harvey J. Volzer
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SEEN:

BAYH, CONNAUGHTON, FENSTERHEIM & MALONE, P.C.

By: /s/ Leslie W. Lickstein

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Counsel for Plaintiff
Federal Deposit Insurance Corporation

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(2)

Supreme Court, U.S.
FILED
APR 18 1994
OFFICE OF THE CLERK

No. 93-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF
THE UNITED STATES,

Petitioner,

v.

CHARLES P. COCKE, ET AL.

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS JOHN E. HARRISON AND LIGHT & HARRISON, P.C. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. Jonathan Schraub
Counsel of Record
Danny M. Howell
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Counsel for Respondents

21 pp

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether federal law may be applied retroactively to revive claims already time-barred under Virginia law before they were assigned to the FDIC, where the claims arose under and were governed exclusively by state law prior to assignment, and where the expiration of state limitations periods constitutes a vested property right under Virginia law.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit are as follows:

Federal Deposit Insurance Corporation
John E. Harrison
Light & Harrison, P.C.
Terry B. Light
Charles P. Cocke
Julius F. Fogel
Lloyd B. Ramsey
Preston L. Walker
John E. Harn, II
Richard E. Blair

There are no parent or subsidiary companies to be listed pursuant to Rule 29.1 of the Rules of the United States Supreme Court.

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No. 93-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF
THE UNITED STATES,

Petitioner,

v.

CHARLES P. COCKE, ET AL.

Respondents,

BRIEF OF RESPONDENTS JOHN E. HARRISON AND LIGHT & HARRISON, P.C. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents John E. Harrison and Light & Harrison, P.C. (collectively, "Harrison") respectfully request that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit submitted by Petitioner Federal Deposit Insurance Corporation ("FDIC"), seeking review of the Fourth Circuit's opinion in this case. That opinion is reported as *FDIC* v. *Cocke*, 7 F.3d 396 (1993).

The FDIC asserts as grounds for granting its petition that the Fourth Circuit's refusal to apply the federal common law tolling rule of "adverse domination" to toll a Virginia statute of limitation, in a suit brought by the FDIC alleging exclusively state law causes of action, is in conflict with *Farmers & Merchants Nat'l Bank* v. *Bryan*, 902 F.2d 1520 (10th Cir. 1990), and with the dictates of *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed. 2d (1979). The FDIC argues that the Fifth

Circuit erred similarly in *FDIC* v. *Dawson*, 4 F.3d 1303 (5th Cir. 1993), decided shortly after *Cocke*.

But the FDIC has either misread *Bryan* and *Kimbell Foods*, or has misapprehended the basis for the decision below and in *Dawson*. No conflict whatsoever exists between the *Cocke* and *Dawson* decisions and the Tenth Circuit's decision in *Bryan*. Instead, *Bryan* stands for the unremarkable proposition that in a suit brought by a federal agency to enforce a federal statutory cause of action, federal statutes of limitations and federal "tolling" principles apply. By contrast, in *Cocke* and *Dawson* the FDIC brought purely state law claims. The decisions of the Fourth and Fifth Circuits in *Cocke* and *Dawson* stand for the similarly unremarkable proposition — supported by some 170 years of Supreme Court precedent and adhered to by every Circuit Court that has had occasion to apply the principal to the FDIC — that the mere act of transferring stale state law claims to a federal entity does not revive them.

Moreover, because the FDIC's claims in *Cocke* and *Dawson* arise under state and not federal law, the rule of *Kimbell Foods* (pertaining to when and under what circumstances federal common law will supply rules of decisions with respect to federal causes of action) is wholly inapplicable to the facts of either case.

In the absence of a split in authority among the Circuits, and in the absence of any error below with respect to the applicability of *Kimbell Foods*, the FDIC's petition should be denied. Moreover, for the reasons set forth in respondents' separate Petition for Certiorari, the complete absence of a record below in support of any tolling theory would constitute separate grounds for affirming the portion of the Fourth Circuit's decision complained of by the FDIC, and constitutes separate grounds for denial of the FDIC's Petition.

OPINIONS BELOW

Harrison is satisfied with FDIC's presentation of the opinions below.

STATEMENT OF JURISDICTION

Harrison is satisfied with FDIC's statement of the jurisdiction of the Court.

COUNTERSTATEMENT OF THE CASE

Petitioner, the Federal Deposit Insurance Corporation ("FDIC"), sued Respondents John E. Harrison, Light & Harrison, P.C., and other former directors or outside counsel of McLean Savings & Loan Association ("MSL") and its mortgage banking subsidiary, McLean Financial Corporation ("MFC") in the United States District Court for the Eastern District of Virginia. The FDIC brought suit as the assignee of claims against former directors and attorneys of MSL, by virtue of the federal takeover and assignment of claims from FDIC in its capacity as receiver of MSL. The FDIC brought suit as the assignee of claims against former directors of MFC, by virtue of the federal receiver of MSL having purchased such claims from MFC's estate in bankruptcy (MSL having divested itself of MFC prior to the federal takeover of MSL).

In its complaint, the FDIC alleged that the directors were negligent and breached fiduciary duties in approving certain loans from MSL to MFC, and that outside counsel was negligent in failing to warn about regulatory violations allegedly associated with the loans. The FDIC did *not* allege that defendants had concealed the facts giving rise to a cause of action against them, or that defendants had "adversely dominated" MSL. Harrison C.A. Br. at 16.

Before the District Court, the FDIC acknowledged that all of its claims were state law claims. Harrison C.A. Br. at 22; C.A. J.A. at 89. The District Court granted the motions of Harrison and others for summary judgment on grounds that the applicable Virginia statute of limitations had run prior to the federal takeover of MSL and the assignment of claims to the federal entity.

At the time of the granting of summary judgment motions, the FDIC's opposition papers were not before the District Court because the FDIC's late-filed opposition had been stricken. The FDIC appealed the decision granting summary judgment against it, but did not appeal the order striking its opposition. Harrison C.A. Br. at 12, 13 n.11. The Fourth Circuit reversed and remanded to allow the FDIC to offer evidence in support of tolling the statute of limitations under Virginia law, and in support of a contract basis for its claims against attorney defendants, but made no mention of the lack of a record in opposition to summary judgment before the District Court or on appeal.

Respondents Harrison and Light & Harrison, P.C. have petitioned this Court for writ of certiorari on the basis that the Fourth Circuit improperly ignored the complete absence of any evidence on the issues for which the FDIC bore the burden of proof, in contravention of the provisions of Fed. R. Civ. P. 56 and the holding of this Court in *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265.

ARGUMENT

I. APPLICATION OF FEDERAL COMMON LAW TO REVIVE STATE LAW CLAIMS THAT HAD BECOME STALE PRIOR TO THEIR ACQUISITION BY THE FEDERAL AGENCY, VIOLATES THE RULE OF *GUARANTY TRUST CO.* V. *UNITED STATES.*

The FDIC does not argue in *Cocke* and *Dawson* that the causes of action it acquired by assignment from the state-chartered thrifts were federal causes of action. To the contrary, the FDIC conceded below that it had brought suit as the assignee of state law claims that, prior to such assignment, were governed exclusively by state statutes of limitations. Harrison C.A. Br. at 22; C.A. J.A. at 89.

Instead, the FDIC argues that in determining whether or not the state law claims had become time-barred prior to being assigned to the FDIC, federal courts should only apply a portion

of the state's law as to statutes of limitations. With respect to tolling rules, the FDIC maintains that once a state law claim is assigned to a federal agency, federal courts must apply federal law to ensure that any applicable state statute of limitations is tolled up until the time the claim is assigned to the Federal Government, regardless of whether or how long ago the claim had become stale under state tolling rules. Only the Federal Government would be the beneficiary of such a tolling rule, since absent the happenstance of assignment to a federal entity, the federal tolling rule would not apply.

In advancing this proposition, the FDIC neglects to set forth (either in its petition in *Cocke* or in its petition in *Dawson*) that its argument runs counter to some 170 years of Supreme Court precedent which holds that stale state law claims are not revived merely by virtue of their transfer to the Federal Government. This time-honored rule is most commonly attributed to *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 142, 58 S.Ct. 785, 82 L.Ed. 1224 (1938), but in fact extends back in our jurisprudence at least 170 years.[1]

A. Without Exception, Federal Courts Have Applied The Rule Of *Guaranty Trust Co.* v. *United States* To Claims Acquired By The FDIC.

The applicability of *Guaranty Trust Co.* v. *United States* to the FDIC's acquisition of claims against former directors has been heretofore undisputed by anyone other than the FDIC. Every Circuit that has considered the question has held, pursuant to *Guaranty Trust* or its progeny, that where the state statute

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[1] *See United States* v. *Buford*, 28 U.S. 12, 7 L.Ed. 585, 591 (1830) ("It can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor. If the character of the claim be so changed as to exempt it from the operation of the statute of limitation after the transfer, such transfer cannot have the effect to take the claim out of the statute when it has run.").

of limitations has expired before the FDIC acquires the claim, it is not revived by transfer to the FDIC.[2]

Moreover, every Circuit that has considered the question has held that where a federal court applies a state statute of limitations to a purely state cause of action to determine its viability when it was acquired by the federal entity, the court must apply all applicable state law, including state law on tolling. *FDIC* v. *Dawson*, 4 F.2d at 1309 ("[T]here is no justification for applying federal equitable tolling principles to pre-receivership events."); *FDIC* v. *Consolidated Mort. & Fin. Corp.*, 805 F.2d 14, 18 (1st Cir. 1986).[3]

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[2] *See e.g.*, *FDIC* v. *Cardona*, 723 F.2d 132, 134 (1st Cir. 1983); *FDIC* v. *Hinkson*, 848 F.2d 432, 434 (3d Cir. 1988); *FDIC* v. *Dawson*, 4 F.2d at 1309; *FDIC* v. *Regier Carr & Monroe*, 996 F.2d 222, 225-26 (10th Cir. 1993).

[3] In *FDIC* v. *Consolidated Mort. & Fin. Corp.*, state law governed not only the question of what limitation period applied to the state law claims of the failed bank prior to their transfer to the FDIC, but also whether the running of those periods had been interrupted by an acknowledgment. The First Circuit held:

> Different legal standards, however, apply to acknowledgments made before or after acquisition. If the purported acknowledgment took place *after* the FDIC acquired the notes (*e.g.*, assuming the Bank's claim had not by then been cut off by the local statute of limitations [*citing FDIC* v. *Cardona*, 723 F.2d at 134]), the effect of any alleged acknowledgment would be determined by federal law. 723 F.2d at 136. *See* 28 U.S.C. § 2415(a)(1983).
>
> But if any alleged acknowledgment occurred *before* FDIC's acquisition of the notes, *Puerto Rico law alone would determine its sufficiency*.

805 F.2d at 18 (emphasis in original).

B. In Determining The Viability Of State Law Claims Before Assignment To The Federal Government, A Federal Court Is Not "Borrowing" A State Statute Of Limitations To Apply To A Federal Cause Of Action, As In *Bryan*. Consequently, No Conflict Exists Between The Tenth Circuit's Decision In *Bryan* And The Decisions Of The Fourth And Fifth Circuits In *Cocke* And *Dawson*.

In its petition, the FDIC ignores the rule of *Guaranty Trust Co.* v. *United States*, and instead suggests that the *Cocke* and *Dawson* decisions are in conflict with the Tenth Circuit's decision in *Farmers & Merchants Nat'l Bank* v. *Bryan*, which applied the federal common law tolling rule of "adverse domination" to claims brought by the FDIC.

But *Bryan* did not involve any determination of whether state law claims had expired in the hands of the failed bank prior to being assigned to the FDIC. Instead, *Bryan* dealt with alleged violations of lending limits imposed on national banks pursuant to federal statute (12 U.S.C. § 84), for which a cause of action is provided under federal law (12 U.S.C. § 93). Since the National Banking Act did not provide its own statute of limitations, the federal court in *Bryan* "borrowed" the state limitations statute, but applied federal common law as to tolling.[4]

The reason why the *Bryan* decision is inapplicable to *Cocke* and *Dawson*, is explained clearly in the *Dawson* opinion, in which the Fifth Circuit stated that while it "disagree[d]" with *Bryan's* determination that federal tolling rules apply when state limitations periods are "borrowed," it *held* that the "borrowing" rule

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[4] *Bryan* also involved claims of making "imprudent" loans, but the Tenth Circuit's opinion makes no distinction between these claims and the statutory lending limit violations. At any rate, there is absolutely no indication in the opinion that certain state law claims were brought that would have been deemed stale under state tolling law.

Since its decision in *Bryan*, the Tenth Circuit has applied adverse domination in *FDIC* v. *Appling*, 992 F.2d 1109 (1993), another case involving causes of action based on 12 U.S.C. § 84.

was completely inapplicable to the facts of the case, since "borrowing" occurs in the context of *federal* causes of action. Lawsuits brought by the FDIC as assignee of state law claims, however, involve *purely state law determinations* as to whether such claims were stale prior to being assigned to a federal entity:

> Wholly apart from the flaws in the *Bryan* court's reasoning, we disagree with its holding for the more fundamental reason that *the federal court is not "borrowing" a state statute of limitations at all in these cases brought by the FDIC under FIRREA* . . . because the FDIC is merely acquiring the claims held by the failed bank, the issue is whether the bank would be time-barred if it tried to sue its directors in state court on the date of the FDIC's appointment as receiver. Only if the bank's claims are still viable under state law on that date does the limitations clock start to run anew under FIRREA's limitations provision. Because this step of the analysis is *purely a question of state law*, there is no justification for applying federal equitable tolling principles to pre-receivership events. If the FDIC is to toll the state statute of limitations prior to its appointment as receiver under the adverse domination doctrine, it must show the district court that the state law of adverse domination would permit tolling.

4 F.3d at 1309 (emphasis added).

C. In Determining The Viability Of State Law Claims Before Assignment To The Federal Government, A Federal Court Is Not Deciding The Rights Of The United States Arising Under A Nationwide Federal Program. Consequently, This Court's Decision In *Kimbell Foods* Is Inapplicable To The FDIC's Claims In *Cocke* And *Dawson*.

In addition to its misreading of *Bryan* as conflicting with *Cocke* and *Dawson* as to which law to apply to "borrowed" statutes of limitations, the FDIC relies on *United States* v. *Kimbell Foods, Inc.* to argue that the federal court must apply federal

law to toll state statutes of limitations when state law claims are acquired by the Federal Government. Once again, the FDIC misreads the case.

In *Kimbell Foods*, this Court dealt with when and under what circumstances federal common law will supply rules of decisions with respect to federal causes of action. *Kimbell Foods* is inapplicable to this or any case involving purely state law claims, for the very same reason that the *Bryan* decision and the use of federal law with respect to "borrowing" state limitations periods for federal causes of action is inapplicable.

Kimbell Foods relied principally on *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943), which held that in cases involving *federally created rights* of the United States arising under nationwide federal programs, federal law governs. By contrast, in *Cocke* the Fourth Circuit correctly noted (just as the Fifth Circuit did in *Dawson*) that in the case of *rights created under state law*, the viability of those rights at assignment depends exclusively on state law. Thus, the Fourth Circuit held,

> Although federal law allows the FDIC, as receiver, to bring McLean's claims, the claims are uniquely state-law causes of action acquired through a wholesale takeover of McLean's assets. If it were not for Virginia common law's prohibitions against breaches of fiduciary duty by corporate directors, the FDIC would have no claims to bring. Therefore, this case does not present the situation [as in *Kimbell*] in which [a] federal statute authorizes and outlines federal activity, but neglects to furnish a crucial provision that would effectuate the federal activity more appropriately.

7 F.3d at 400.

D. Over Forty Years Ago, The Very Circuit That Originated The Adverse Domination Rule Anticipated And Rejected The FDIC's Legal Arguments For Applying Federal Law To Toll State Causes Of Action Prior To Their Assignment To The Federal Government.

The Fourth and Fifth Circuits' rejection in *Cocke* and *Dawson* of the FDIC's "borrowing" and *Kimbell Foods* arguments as being inapplicable to the determination of the viability of purely state law causes of action prior to their acquisition by a federal entity, mirrors the very approach taken some forty years ago by the very Circuit which originally formulated the "adverse domination" doctrine.[5] In a parallel situation involving suit by a bankruptcy trustee to enforce state causes of action as to pre-bankruptcy breaches of duties by corporate directors under former 11 U.S.C. § 11(e) (which causes of action became, by virtue of the bankruptcy petition, part of the bankruptcy estate, and subject to enforcement under federal bankruptcy statutes), the Second Circuit in *Austrian* v. *Williams*, 198 F.2d 697 (1952), *cert. denied*, 344 U.S. 909, faced the choice of applying its own federal common law rule of adverse domination, or New York's law which flatly precluded the use of adverse domination by statute.

In *Austrian* v. *Williams*, the Second Circuit held that because state law determined the viability of the acquired state law claim in the hands of the trustee, the federal court may not avoid the use of state tolling law by means of the "borrowing" rule or the rule of *Clearfield Trust Co.* v. *United States* (upon which *Kimbell Foods* is based). 198 F.2d at 702. With respect to *Clearfield Trust*, the Second Circuit held, "[the]clear mandate to apply the state limitations statute . . . includes its application in the manner established by other relevant provisions of state law[,] and state court interpretations of state law." 198 F.2d at

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[5] *See International Rys. of Cent. Am.* v. *United Fruit Co.*, 373 F.2d 408, 412-14 (2d Cir. 1967) (Friendly, J.), *cert. denied*, 387 U.S. 921, *citing Michelsen* v. *Penney*, 135 F.2d 409, 415 (2d Cir. 1943).

701. In ruling that the borrowing rule was inapplicable, the Second Circuit noted that in the seminal "borrowing" case of *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946), this Court carefully distinguished between its announced rule for federally created causes of action, and "State-created rights."

E. No Basis Exists Under FIRREA To Apply Adverse Domination To Revive Otherwise Stale State Law Claims.

The FDIC leans heavily on the existence of a federal statutory scheme embodied in FIRREA as proof of its need for a uniform federal rule.[6] But no basis exists under FIRREA to allow the FDIC to revive claims that became time-barred under state law prior to their acquisition by the Federal Government.

Nothing in FIRREA indicates a Congressional intent to revive stale state-law claims. Had Congress desired a different result under FIRREA, Congress could have so provided.[7] However, in revamping the nation's banking laws, Congress left undisturbed the dictates of *Guaranty Trust Co.* v. *United States*.[8] As a result, FIRREA's statute of limitations (and any federal equitable tolling rules) only apply if the FDIC acquired viable claims under state law.

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[6] Such a uniformity argument has been made by the FDIC in contexts other than statutes of limitations, typically with regard to regulatory exclusions in directors' and officers' liability policies. The argument has been consistently rejected. *See e.g.*, *FDIC* v. *American Cas. Co.*, 995 F.2d 471 (4th Cir. 1993), *citing Fidelity & Deposit Co.* v. *Conner*, 973 F.2d 1236 (5th Cir. 1992); *FDIC* v. *American Cas. Co.*, 975 F.2d 677 (10th Cir. 1992); *St. Paul Fire & Marine Ins. Co.* v. *FDIC*, 968 F.2d 695 (8th Cir. 1992); *American Cas. Co.* v. *FDIC*, 944 F.2d 455 (8th Cir. 1991).

[7] As indeed Congress did so provide in a section of FIRREA pertaining to subrogation rights. *See* 12 U.S.C. § 1821(g).

[8] *See e.g.*, *RTC* v. *Hecht*, 833 F. Supp. 529, 531 (D. Md. 1993) ("[T]here is nothing [in FIRREA] to indicate a Congressional policy that would justify the federal courts' applying a special rule 'trumping' state precedent for the benefit of the RTC.").

Nor may FIRREA be applied retroactively so as to revive otherwise stale causes of action. *FDIC* v. *Regier Carr & Monroe*, 996 F.2d at 225-26; *FDIC* v. *Belli*, 981 F.2d 838, 842 (5th Cir. 1993); *Randolph* v. *RTC*, 995 F.2d 611, 619 (5th Cir. 1993), *cert. denied*, 127 L.Ed.2d 647 (1994).

The FDIC argues, essentially, that unless it is allowed to revive stale state law claims, its national collection efforts will be hampered. Once again, the Second Circuit in *Austrian* v. *Williams* forty years ago rejected the very policy arguments urged today by the FDIC: that its decision would be contrary to the purpose and uniform application of a federal program. The Court noted that under the federal statute, state law was to be applied to determine if the causes of action were alive at time of the petition. Thus, "there can be no escape from the diverse periods of limitations set up in the various state statutes which are applicable however they are construed." 198 F.2d at 702. More important was the absence of any Congressional intent that stale claims were to be revived:

> [It seems] likely [that] Congress did intend to utilize the bankruptcy procedure to expose corporate abuses and, therefore, gave to the trustee sufficient time after his appointment to permit him to investigate the situation and to prosecute any causes of action thus found to exist.
>
> *But this purpose did not include the revival of causes of action which, under the various applicable statutes of limitation, were barred.* We think that the desirability of the repose policy of the state limitations periods was intended to be recognized by Congress and given effect in the manner in which the various states saw fit to make this policy effective. If this be not the purpose of [the statute], then its effect would be to revive, or create, causes of action, a concept without any reasonable basis.

198 F.2d at 702 (emphasis supplied).

Such applicability of state law in fact poses even less of a hindrance to the FDIC's efforts than it arguably does in the bankruptcy context, because unlike the bankruptcy trustee, the FDIC has every means necessary by which to apprise itself of suspected wrongdoing *prior* to receivership, and every power necessary to act on that knowledge.

F. The Retroactive Application Of The Statute Of Limitations Provided By FIRREA, As Urged By The FDIC, Would Constitute An Unconstitutional Taking Of A Vested Property Right Without Due Process Of Law.

The "repose policy of the state limitations periods" referred to in *Austrian* v. *Williams* is more than a policy in Virginia, it is a property right protected by due process, a right that vests upon the running of the limitation period. *Starnes* v. *Cayouette*, 419 S.E.2d 669, 674 (Va. 1992)(the defense that arises by virtue of the lapse of the time fixed in the statute of limitations and the tolling statute is a right "to a valuable property interest" protected by due process guarantees under Virginia law, pursuant to Va. Code § 8.01-234).

Whether by direct, retroactive application of FIRREA's provisions on accrual and limitation periods, or by the *post hoc* application of a national federal tolling rule, the FDIC seeks to revive stale state claims. However, due to the fact that the running of a limitations period in Virginia is a vested property right, such an application of FIRREA or federal common law to these expired Virginia claims would be an unconstitutional taking of property without due process. *See Wm. Danzer & Co.* v. *Gulf & S.I.R. Co.*, 268 U.S. 633, 45 S.Ct. 612, 69 L.Ed. 1126 (1925).

II. THE FDIC FAILED TO INTRODUCE ANY EVIDENCE IN SUPPORT OF ANY TOLLING THEORY.

For the reasons set forth in respondents' separate Petition for Certiorari, the FDIC's failure to offer any evidence in opposition to summary judgment that would justify tolling the statute of limitations under *any* state or federal tolling theory, provides

separate grounds for affirming that portion of the Fourth Circuit's decision complained of by the FDIC, without regard for the question sought to be raised by the FDIC's petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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NO. 93-1485

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF THE UNITED STATES,

Petitioner,

v.

CHARLES P. COCKE, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT CHARLES P. COCKE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether federal law may be applied retroactively to revive state law claims against officials of failed federally insured financial institution that were time-barred under applicable state statutes of limitation before they were assigned to the Federal Deposit Insurance Corporation as receiver of the institution.

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CHARLES P. COCKE, ET AL.,
Respondents.

BRIEF OF RESPONDENT CHARLES P. COCKE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Charles P. Cocke ("Cocke") respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari ("FDIC Petition") filed by Petitioner, Federal Deposit Insurance Corporation ("FDIC"), in this case. For the reasons set forth herein, Cocke requests that the FDIC Petition be denied. Cocke further urges this Court to grant the companion Petition for Writ of Certiorari filed by Petitioners John E. Harrison and Light & Harrison, P.C. ("Harrison Petition") in this case.

COUNTERSTATEMENT OF THE CASE

Cocke relies upon and incorporates by reference the Counterstatement of the Case presented in the Brief of Respondents John E. Harrison and Light & Harrison, P.C. in Opposition to Petition for Writ of Certiorari ("Harrison Brief in Opposition") filed in this case. In addition, Cocke relies upon and incorporates by reference the Statement of the Case presented in the Harrison Petition filed with this Court. The Statements of the Case in the Harrison Brief in Opposition, in the Harrison Petition and in the FDIC Petition focus primarily upon the complex maze of facts and legal proceedings surrounding the primary litigation between FDIC and the former officers, directors and attorneys of McLean Savings and Loan Association ("McLean Savings") and McLean Financial Corporation ("McLean Financial") who were originally named in the Complaint ("Leonard Complaint") filed by FDIC on November 29, 1991 in the U.S. District Court for the Eastern District of Virginia, Alexandria Division. However, Cocke was not a party to this original lawsuit and was not named at that time as a principal participant in any of the alleged activities described in the Leonard Complaint. Several key aspects of his situation require focus and comment.

FDIC filed a separate Complaint against Cocke ("Cocke Complaint") on March 9, 1992. Cocke filed a Motion to Dismiss on April 17, 1992. On May 1, 1992, Judge Albert V. Bryan, Jr. granted a series of Motions for Summary Judgment filed by several of the principal Defendants named in the Leonard Complaint. FDIC's counsel recognized that these rulings made by the District Court in the Leonard case would govern the Court's consideration of the Motion to Dismiss filed by Cocke. While preserving his objections to these rulings, FDIC's counsel consented to and executed a Final Order granting Cocke's Motion to Dismiss. The Final Order entered by the District Court on August 12, 1993 incorporated key factual and legal acknowledgements by both FDIC and Cocke. *See* FDIC Petition, 20a-22a. Cocke was an officer and director of McLean Savings from 1977 through

January, 1988. He was a director of McLean Financial from 1982 through September, 1987. The claims alleged by FDIC against Cocke "arose no later than April, 1987". Both parties expressly acknowledged that under the provisions of §8.01-248 of the Code of Virginia, 1950, as amended, the Virginia statute of limitations for the claims alleged against Cocke "expired no later than April, 1988". It was not until July 8, 1988 that the Federal Home Loan Bank Board ("FHLBB") appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver of McLean Savings. By virtue of certain tolling agreements executed by the parties, FDIC and Cocke agreed that the Cocke Complaint was "deemed filed" on June 5, 1991. Accordingly, FDIC admitted that its claims against this Respondent were not filed until after the statute of limitations in §8.01-248 had expired. On this basis, the Motion to Dismiss was granted and the Cocke Complaint was dismissed with prejudice.

More importantly, the Cocke Complaint contained no allegations that Cocke had perpetrated any fraud or engaged in any concealment of the facts which gave rise to the claims made by FDIC against him. In response to the Motion to Dismiss, FDIC came forward with no evidence that Cocke had engaged in any activity that concealed or attempted to conceal these alleged causes of action. In the Final Order entered by the District Court, FDIC made no attempt to preserve any argument that the applicable statute of limitations had been tolled by any conduct by Cocke. In short, there is no evidence in the record of this case that would permit the District Court, the Fourth Circuit Court of Appeals or this Court to conclude, suspect or infer that the applicable state statute of limitations invoked by Cocke should have been tolled under principles of equitable estoppel.

SUMMARY OF ARGUMENT

This Court's recent opinion in *O'Melveny & Myers v. FDIC* and its denial of the FDIC's Petition for Writ of Certiorari in *FDIC v. Dawson* should leave little doubt that the FDIC Petition in this case should be denied. The one (1) year Virginia statute of limitations on these state law claims against Cocke had expired prior to the federal takeover of McLean Savings on July 8, 1988. The appointment of FDIC as receiver for the institution did not revive these time-barred claims. There is no federal common law doctrine of adverse domination that would suspend the running of applicable state statutes of limitations on such causes of action.

However, the Fourth Circuit Court of Appeals erred in its decision to remand these consolidated cases to the District Court for a determination of whether the statute of limitations was tolled under the doctrine of equitable estoppel. There was no evidence in the record that would permit any such finding that Cocke or any of the other former officials of McLean Savings and McLean Financial had engaged in any effort to conceal any of the facts which gave rise to the FDIC's allegations of breach of duty, negligence, gross negligence and breach of contract in this case. The District Court's findings on these issues should have been affirmed in all respects and the claims filed by FDIC against Cocke should have been dismissed without remand of any kind.

ARGUMENT

I. THE DISTRICT COURT AND THE FOURTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT FDIC'S CLAIMS WERE BARRED UNDER THE APPLICABLE VIRGINIA STATUTE OF LIMITATIONS.

The primary issue decided by the District Court and the Fourth Circuit Court of Appeals in this case was whether the claims asserted by FDIC against the former officials of McLean Savings

and McLean Financial were time-barred under the applicable Virginia statute of limitations. All parties acknowledged that these were state law claims.[1] All parties acknowledged that the claims arose no later than April, 1987.[2] All parties acknowledged that the federal takeover of McLean Savings did not occur until July, 1988.[3] All parties acknowledged that pursuant to the various tolling agreements entered into with FDIC, the complaints against the various Respondents were deemed filed on June 5, 1991. To the extent that any such claims remained viable on June 5, 1988, they were properly preserved for FDIC under the three (3) year statute of limitations provided by the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA").[4] However, if the statute of limitations on these claims already had expired by that point in time, FDIC would be stepping into empty shoes.

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[1] The Cocke Complaint broadly describes various transactions from 1984 through 1988 involving McLean Savings and McLean Financial in which Cocke allegedly breached fiduciary duties (Count I), committed negligence (Count II), committed gross negligence (Count III) and breached an express or implied contract (Count IV). These allegedly culpable actions related generally to certain loans between McLean Savings and McLean Financial, certain excess yield payments by McLean Savings to McLean Financial, a dividend declared by McLean Savings, the release of collateral by McLean Savings on the Spann-Bellinger Properties and the payment of excess compensation to certain officers of McLean Financial.

[2] The "last act or omission challenged by the FDIC occurred in April of 1987". *See* FDIC Petition, 3.

[3] *See* FDIC Petition, 2.

[4] Under 12 U.S.C. §1821(d)(14), the statute of limitations for tort claims brought by FDIC as receiver is three (3) years from the later of (a) the date that FDIC was appointed as receiver, or (b) the date on which the cause of action accrued.

Both the District Court and the Court of Appeals found that these state law claims were governed by the one (1) year statute of limitations found in §8.01-248 of the Code of Virginia, 1950, as amended.[5] In its Petition filed with this Court, FDIC does not specifically address the issue of whether this one (1) year statute of limitations controls such state law claims. Rather, FDIC argues that federal law governs the question of whether the adverse domination doctrine operates to toll the state statute of limitations on a claim acquired by a federal agency as receiver of a failed financial institution. *See* FDIC Petition, 5. FDIC claims that the Fourth Circuit should have followed the guidance of *Farmers & Merchants National Bank v. Bryan*, 902 F.2d 1520, 1522 (10th Cir. 1990) which permitted the "borrowing" of a state statute of limitations while applying federal tolling principles.[6]

Cocke adopts and incorporates by reference the arguments and authorities presented in the Harrison Brief in Opposition on these issues. *See* Harrison Brief in Opposition, 4-13. As Harrison thoroughly and eloquently explains, federal courts have consistently held that where a state statute of limitations has expired before FDIC has acquired a claim, the cause of action is not revived by its mere transfer to the federal agency. *See*

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[5] The District Court relied on two (2) recent Virginia decisions which focused on the proper distinction between injuries to persons and injuries to property under applicable statutes of limitation. *See C-T of Virginia, Inc. v. Barrett*, 124 B.R. 694 (W.D. Va. 1990), *aff'd*, 958 F.2d 606 (1992); *Pigott v. Moran*, 231 Va. 76, 341 S.E.2d 179 (1986). FDIC utterly failed to distinguish these pivotal Virginia cases in the District Court proceedings. On appeal, the Fourth Circuit specifically declined to follow FDIC's suggestion that a five (5) year statute of limitations for damage to property should govern these claims. *FDIC v. Cocke*, 7 F.3d 396, 401-02 (4th Cir. 1993).

[6] *Bryan* dealt with alleged violations of lending limits imposed on national banks pursuant to federal statute (12 U.S.C. §84) for which a cause of action is specifically provided under federal law.

Guaranty Trust Co. v. United States, 304 U.S. 126, 142, 58 S.Ct. 785, 82 L.Ed. 1224 (1938). The 10th Circuit's holding in *Bryan* must be properly limited to cases involving federal causes of action, not state law claims. *See FDIC v. Dawson*, 4 F.3d 1303, 1309 (5th Cir. 1993). The federal receiver cannot invoke federal adverse domination principles to toll state law statutes of limitation.

More importantly, FDIC suggested that its Petition in this case should be "held" in order to permit the ultimate disposition of two (2) other cases which were pending before the Court at that time. *See* FDIC Petition, 7. The case of *O'Melveny & Myers v. FDIC* was scheduled for argument before the Court on March 21, 1994. On that same day, FDIC filed its Petition for Writ of Certiorari in *FDIC v. Dawson*. FDIC felt that this Court's handling of these two (2) appeals would provide appropriate guidance on the issues raised in its Petition in *Cocke*.[7] The final sentence of FDIC's Petition presents what could become a self-fulfilling prophecy for the government in this appeal: "The cases then should be disposed of as applicable in light of the Court's disposition of those two cases." *See* FDIC Petition, 7.

On June 13, 1994, this Court issued its decision in *O'Melveny*. Justice Scalia's opinion leaves little doubt about the viability of FDIC's argument that federal law should govern the handling of such state law claims. The unanimous Court rejected FDIC's claim that federal law should control the state law issue of whether knowledge of corporate officials of fraudulent conduct could be imputed to the savings and loan itself:

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[7] FDIC contended that *O'Melveny* "may shed light on the proper analysis to be used in deciding *Dawson* and these cases." FDIC also suggested that *Dawson* "would constitute a better vehicle than these cases for such plenary review." *See* FDIC Petition, 6.

> "The first of these contentions need not detain us long, as it is so plainly wrong. 'There is no federal general common law,' *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938), and (to anticipate somewhat a point we will elaborate more fully in connection with respondent's second contention) the remote possibility that corporations may go into federal receivership is no conceivable basis for adopting a special federal common-law rule divesting States of authority over the entire law of imputation." ___ U.S. ___, 114 S.Ct. 2048, 2053, ___ L.Ed. ___ (1994).

The Court also rejected FDIC's reliance on *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). Just like the Fourth Circuit in *Cocke* and the Fifth Circuit in *Dawson*, the *O'Melveny* Court properly recognized that state law rules must govern state law claims. 114 S.Ct. at 2053.[8]

Justice Scalia also addressed the government's contention that the entire statutory scheme of FIRREA should preempt state law rules in cases brought by FDIC. The Court recognized that an explicit federal statutory provision might displace applicable state law. However, after reviewing the statutory scheme of this particular legislation, the Court found no justification for such displacement of state law in this case:

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[8] In *Cocke*, the Fourth Circuit held that FDIC's state law claims "must be governed by the Virginia courts' and legislature's interpretations of that action." 7 F.3d at 400. Likewise, in *Dawson*, the Fifth Circuit observed that "when state statutes of limitation are borrowed, state tolling principles are to be the 'primary guide' of the federal court." 4 F.3d at 1309 *citing Johnson v. Railway Express Agency*, 421 U.S. 454, 465, 95 S.Ct. 1716, 1722, 44 L.Ed.2d 295 (1975).

> "It is hard to avoid the conclusion that §1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it." 114 S.Ct. at 2054.

While *O'Melveny* dealt primarily with state law imputation principles, there is no logical reason for distinguishing state law tolling principles regarding statutes of limitations. Absent some specific federal statutory provision, applicable state law must govern.[9]

This Court's decision in *O'Melveny* decimates FDIC's position in *Cocke*. Any lingering doubt about the viability of the government's argument on federal preemption of state law tolling principles was answered on the very same day that the *O'Melveny* decision was announced. On June 13, 1994, this Court also denied FDIC's Petition for Writ of Certiorari in *Dawson*. The Fifth Circuit's opinion had dealt with the precise questions raised in the

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[9] In *Dawson*, the Fifth Circuit dealt more directly with this issue within the context of such statute of limitations tolling principles:

> "That is, because the FDIC is merely acquiring the claims held by the failed bank, the issue is whether the bank would be time-barred if it tried to sue its directors in state court on the date of the FDIC's appointment as receiver. Only if the bank's claims are still viable under state law on that date does the limitations clock start to run anew under FIRREA's limitations provision. Because this step of the analysis is purely a question of state law, there is no justification for applying federal equitable tolling principles to pre-receivership events." 4 F.3d at 1309.

FDIC Petition in *Cocke*. The Fifth Circuit held that state law statutes of limitation governed state law claims. The Fifth Circuit held that state law tolling provisions were controlling. The Fifth Circuit held that federal adverse domination principles did not apply. The Fifth Circuit expressly declined to follow *Bryan* or *Kimbell*, two (2) cases which provide the shaky foundation for FDIC's entire position in this appeal. 4 F.3d at 1308-10.

In the wake of this Court's ultimate disposition of *O'Melveny* and *Dawson*, there appears to be little basis for granting the FDIC Petition in *Cocke*. The one (1) year Virginia statute of limitations should govern FDIC's claims against the former officials of McLean Savings and McLean Financial. Federal adverse domination principles are inapplicable. State law tolling provisions must govern. The rulings made by the District Court and the Fourth Circuit on these issues should be affirmed and the FDIC Petition should be denied. However, this still leaves one troubling, unanswered question for the Court's consideration: Is there any reason to remand these cases to the District Court for a determination of whether the statute of limitations was tolled under state law principles of equitable estoppel?

II. THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN REMANDING THIS CASE TO THE DISTRICT COURT FOR A DETERMINATION OF WHETHER THE STATE STATUTE OF LIMITATIONS WAS TOLLED UNDER THE DOCTRINE OF EQUITABLE ESTOPPEL.

After finding that FDIC's claims against Respondents were governed by the one (1) year statute of limitations in §8.01-248 of the Code of Virginia, 1950, as amended, the Fourth Circuit then considered the question of whether the running of the statute was tolled under state law equitable estoppel principles. While noting that Virginia courts have not adopted the doctrine of adverse domination, the Court of Appeals recognized that certain

intentional, fraudulent conduct by Respondents might toll the statute:

> "Based on these provisions of Virginia statutory and case law, we hold that a statute of limitations is tolled until a person intentionally misled by a putative defendant could reasonably discover the wrongdoing and bring action to redress it. Therefore, we conclude that the district court erred by rejecting outright the application of a tolling mechanism to the facts of this case. Under Virginia's doctrine of equitable estoppel, however, the FDIC will have to do more than show that all of McLean directors were implicated in the wrongdoing, and that it was unable to sue until it became the corporation's receiver. The FDIC also will have to show that the directors concealed their wrongdoing from McLean, MFC, and their shareholders, the parties from whom the FDIC derived its interest in this lawsuit, during the period after the last act of alleged misconduct until the FDIC became receiver." 7 F.3d at 402-03.

The Court of Appeals then remanded the case back to the District Court for a proper determination of this equitable estoppel question.

Harrison dealt with this issue in considerable detail in his separate Petition for Writ of Certiorari to this Court. Cocke adopts and incorporates by reference all of the arguments and authorities cited by his fellow Respondent. *See* Harrison Petition, 8-16. The tolling issue was properly presented to the District Court in the argument on Respondents' Motion for Summary Judgment on May 1, 1992. In their Motion and supporting materials, Respondents had vigorously contested any suggestion that any of their allegedly culpable acts had been intentionally

concealed. FDIC attempted to file various opposition papers with the District Court in response to the statute of limitations question raised by Respondents. Since these pleadings were not timely filed by FDIC, they were stricken by the District Court. FDIC never appealed this specific ruling by Judge Bryan. However, on appeal to the Fourth Circuit, FDIC relied extensively on these stricken pleadings in an attempt to support its federal adverse domination argument regarding the tolling of the statute of limitations.

FDIC clearly had the burden of proof on any such tolling issues. FDIC clearly had the burden of coming forward with some evidence that would support a finding of intentional concealment. FDIC clearly failed to meet even minimal standards of persuasion on this issue. Instead, the record presented to the District Court conclusively showed that there was no basis for any finding that Respondents had concealed any alleged wrongdoing. As Harrison's Petition highlights, the transactions which serve as the primary basis for FDIC's claims against Respondents were disclosed to the Federal Home Loan Bank Board examiners, disclosed to independent shareholders, disclosed in the public financial statements of McLean Savings and disclosed to at least one former officer and shareholder of McLean Savings who was not charged with any wrongdoing by the government. In response to these facts presented by Respondents in their Motion for Summary Judgment, FDIC came forward with no evidence of concealment by the former officers and directors of the institution. *See* Harrison Petition, 9.[10]

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[10] Even the stricken pleadings filed by FDIC failed to produce any such facts or evidence that would support a finding of concealment. At most, FDIC's opposition papers sought to establish a form of non-intentional equitable estoppel by virtue of assurances given by McLean Savings to the FHLBB that the institution was sufficiently sound to preclude the imposition of formal regulatory restrictions. *See* Harrison Petition, 11.

Cocke's unique position in this litigation provides even less justification for a remand to the District Court on the claims made against him. The Cocke Complaint contained no allegations that Cocke had perpetrated any fraud or engaged in any concealment of the facts which gave rise to the claims of breach of duty, negligence, gross negligence and breach of contract made by FDIC against him. In response to the Motion to Dismiss, FDIC came forward with no evidence that Cocke had engaged in any activity that concealed or attempted to conceal these alleged causes of action. In the Final Order entered by the District Court, FDIC made no attempt to preserve any argument that the applicable statute of limitations had been tolled by any conduct by Cocke. In short, there is no evidence in the record of this case that would permit the District Court, the Fourth Circuit Court of Appeals or this Court to conclude, suspect or infer that the applicable state statute of limitations invoked by Cocke should have been tolled under principles of equitable estoppel.[11]

The record in this case strongly suggests that the government's untimely filing of these claims was not caused by any adverse domination or fraudulent concealment by Respondents, but by its own inartful, sometimes comedic, handling of this entire matter.[12] The Federal Home Loan Bank Board had actual knowledge of many of these allegedly culpable transactions in 1986 and 1987 within the context of its regulatory review of McLean Savings. McLean Financial declared bankruptcy in September, 1987. The

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[11] *Dawson* also suggests that no finding of adverse domination can be based solely upon allegations of negligent conduct by the directors of a failed institution: "The facts of the instant case demonstrate that the adverse domination theory is inappropriate when the majority of the board is merely negligent." 4 F.3d at 1312. In the Complaint filed against Cocke, FDIC asserts no intentional misconduct or fraud. The government's state law claims are based solely upon accusations of breach of duty, negligence, gross negligence and breach of contract.

[12] *See* Harrison Petition, 4-7.

Bank Board waited until July, 1988 to take any formal action to seize control of McLean Savings. FDIC and its inexhaustible army of lawyers, accountants, regulators and investigators poured through the records, documents and files of McLean Savings and McLean Financial for almost three and one-half (3-1/2) years before they filed their original Complaint against Leonard and the other original Respondents in November, 1991. FDIC waited another three (3) months before filing its Complaint against Cocke. FDIC's handling of the litigation itself was characterized by inadequate pleadings, late filings, inexcusable errors and ultimate failures. After consuming over six (6) years, millions of taxpayer dollars and all the patience the U.S. District Court had to offer, FDIC's relentless pursuit of this litigation has little or nothing to show for itself except a last-ditch, desperate appeal to this Court. Unsubstantiated government assertions of adverse domination and fraudulent concealment by Respondents have no legitimate place in this case. FDIC itself must bear the sole responsibility for its failure to act in a timely manner in the filing of these claims.

Under these circumstances, Cocke urges this Court to follow a somewhat unique path toward the final resolution of these claims. The FDIC Petition should be denied. The Harrison Petition should be granted. The portion of the Fourth Circuit's opinion which mandates a remand of this case to the District Court for findings on equitable estoppel should be reversed in all respects. FDIC already had its opportunity to present such evidence to the District Court. It failed to carry its burden of proof on this issue. No second bite at the apple is warranted. It is time to bring this phase of the McLean Savings witch hunt to a merciful end. At the very least, it is time to remove this cloud from over the head of Charles P. Cocke.

CONCLUSION

For all of the foregoing reasons, Respondent, Charles P. Cocke, respectfully prays that the Petition for a Writ of Certiorari filed by Petitioner, Federal Deposit Insurance Corporation, should be denied.

Respectfully submitted,

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